

CITATION: CITY OF OTTAWA v. PERSONS UNKNOWN, 2022 ONSC 1151
COURT FILE NO.: CV-22-88569
DATE: 2022-02-22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CITY OF OTTAWA

AND:

PERSONS UNKNOWN

BEFORE: Associate Chief Justice Faye E. McWatt

COUNSEL: *Kevin P. Nearing and Michelle Doody*, for the Applicant

Andrew Gibbs, for the Intervenor, the Attorney General of
Canada

Padraic Ryan and Waleed Malik, for the Intervenor, the Attorney General of
Ontario

HEARD and DETERMINED: February 14, 2022

REASONS RELEASED: February 22, 2022

ENDORSEMENT

OVERVIEW

[1] The Respondents (Freedom Convoy 2022) arrived in Ottawa on January 28, 2022 to demonstrate, initially, against COVID-19 vaccine requirements for truckers to re-enter the country by land introduced by the Government of Canada on January 15, 2022. It has grown into a broader demonstration (“the Demonstration”) against COVID-19 public health measures.

[2] A rally was held on Parliament Hill on January 29, 2022.

[3] It did not stop nor did the demonstrators leave.

[4] On February 12, 2022, the City of Ottawa (the City”) alleged, in this ex-parte motion for an Interim Injunction, that the Respondents, Persons Unknown, were committing numerous

violations of municipal by-laws which were impeding and impairing the City's ability to perform essential functions and protect public safety.

[5] The City brings the motion for an injunction pursuant to section 440 of the *Municipal Act*, 2001, section 101 of the *Courts of justice Act* and Rule 40 of the *Rules of civil Procedure*, to restrain the Respondents from idling their vehicles in the downtown core, lighting open fires without a permit, setting off fireworks, causing excessive noise, and erecting temporary structures in contravention of municipal by laws 2007-266; 2004-163; 2003-137; 2003-498 and 2017-255.

[6] At the conclusion of the hearing on February 14, 2022, I granted an injunction pursuant to section 440 of the *Municipal Act*. These are the reasons why.

THE EVIDENCE

[7] From January 28, the Respondents have blockaded multiple streets in the downtown core of Ottawa, causing massive disruption to the city, including to residents, businesses, transit and emergency response services.

[8] The Respondents' behavior has also included parking and idling vehicles, including pickup trucks and semi-trucks, mainly in the downtown core of the city but also in other areas. The Respondents have been observed lighting open fires without permits, erecting temporary shelters, setting off fireworks and violating various provisions of the City's noise by-laws. The Respondents have gone so far as to bring hot tubs onto city property and erect a jumbotron on Wellington Street.

[9] The Respondents have stated that they are not leaving Ottawa until their demands are met.

[10] The February 13, 2022 Affidavit of Kim Ayotte sets out the evidence before me on this motion. I summarize it here.

[11] Mr. Ayotte is the General Manager of the City of Ottawa's Emergency and Protective Services ("EPS") Department.

[12] In his position, he oversees several units, including the City of Ottawa's Paramedic Service, By-law & Regulatory Services, Fire Service, and Security and Emergency Management. His office and staff work closely within the EPS Department, and with other City units, including Ottawa Public Health, Building Code Services, Community and Social Services, as well as with external agencies, including the Ottawa Police Service.

[13] On February 6, 2022, The Mayor of the City of Ottawa declared an emergency in relation to the Demonstration.

[14] On February 11, 2022, the Province of Ontario declared an emergency related to the Demonstration and other events across Ontario.

[15] Participants in the Demonstration are in different areas of the city. However, the heaviest concentration of trucks and vehicles is in the downtown core in an area that the Applicant has called the "Demonstration zone". The Demonstration has caused disruption across the city, including at

RCGT Park, located at 302 Coventry Road, 1500 Bronson Avenue, and various highways and walkways within the municipal boundaries. The disruptions are causing public safety issues.

[16] The demonstrators have parked transport trucks and other vehicles on city streets to block traffic. To support the parked transport trucks and the demonstrators, an organized network of services has cropped up. The demonstrators are providing fuel supplies for the vehicles, as well as food and beverage supplies, including barbequing and open fires to heat food. Other services and structures have been brought to the Demonstration including a stage for live music, a disc jockey for dance parties, hot tubs and an inflatable bouncy castle and inflatable slides for children who are with the demonstrators.

[17] All these activities violate one or more of the City's by-laws as follows.

Violations of Specific By-laws

[18] Photographs taken from CCTV footage of the intersection of Wellington Street and Metcalfe Street, in the downtown core, show vehicles idling for extended periods of time, beyond what is permitted under By-law 2007-266.

[19] Participants in the Demonstration are living in and/or around their parked vehicles and lighting open air fires throughout the city in contravention of the Open-Air Fire By-law No. 2004-163. City Fire Services have had to respond to these open-air fires lit without the proper permits. Multiple photos of stockpiled fuel and an open fire in Confederation park were filed as exhibits. No fire permits have been issued in relation to the Demonstration.

[20] Temporary structures, such as tents and lean-to shelters, have been erected on the roadways in downtown Ottawa and at RCGT Park in contravention of the Use and Care of Roads By-law No. 2003-498.

[21] Fireworks are being discharged in the downtown core in violation of section 5 of the Fireworks By-law 2003-237.

[22] The demonstrators' actions are interfering with the City's ability to maintain the roads, perform snow removal, conduct traffic enforcement, enforce by-laws, provide public transit and perform waste removal.

[23] The demonstrators have caused a significant increase of noise in the city and, in doing so, have contravened a number of provisions of the Noise By-law 2017-255. These include idling motor vehicles, honking vehicle horns, use of air horns and exceeding limits on sound reproduction or amplification devices.

Unreasonable Strain on the City's Resources

[24] The activities of the demonstrators have placed an unreasonable demand on the City's staff and the City's resources. The City had been inundated with complaints and calls from its residents and has not been able to effectively respond to the volume of calls and complaints.

[25] City By-law officers have been told by the OPS not to enter the Demonstration zone to issue tickets for by-law infractions due to concerns for their safety.

[26] Nonetheless, over 2,000 tickets for by-law infractions have been given out since January 28th in relation to the Demonstration. Specifically, 1,732 parking tickets have been issued in the Demonstration zone from January 28 to February 10, 2022.

[27] On February 8, as a response to the by-law breaches, the Ontario Court of Justice issued an Order approving the City's request for an increased set-fine for noise violations, open-air fires and use & care of roads violations. On February 9, the Ontario Court of Justice issued an Order approving the City's request for an increased set-fine for idling vehicles.

[28] The increased fines and public outcry have caused no notable decrease in the ongoing by-law violations due to the City's inability to respond to the violations - because of the activities of the Respondents and because By-law officers have been told not to enter the Demonstration zone unless they are accompanied by a member of the OPS.

THE LAW

A. Ex-Parte Motions and Unknown Persons

[29] Case law, from Ontario and across Canada, allows that an injunction can be ordered on unknown persons. Furthermore, procedural fairness is likely met in issuing the injunction on an *ex parte* basis so long as the three parts of the *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 test are met, there is urgency for the order, and the moving party has provided full and frank disclosure.

[30] In *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, the Supreme Court of Canada dealt with the issue of whether courts have the power to grant injunctions against members of the public who are engaged in protests that interfere with the private rights of others. Related to this was the question of whether the courts could make orders against unidentified persons not named in the action or referenced by proxy as "Jane Doe" or "John Doe", and whether such orders are enforceable even if they are not named in the order. At paragraph 23 of the decision, the Court held that an injunction can be brought against non-parties on the basis of the long-standing principle that "non-parties may be seen as being, if not technically bound by the order, bound to obey the order".

B. Legislative Framework

Interim Injunction Under Section 101 of the *Courts of Justice Act*

[31] Section 101 of the *Courts of Justice Act*, RSO 1990, c C 43 and Rule 40.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 authorize the Court to grant an interlocutory injunction "where it appears to a judge of the court to be just or convenient to do so."

[32] Rule 40.02(1) of the *Rules of Civil Procedure* provides that an interlocutory injunction or mandatory order may be granted on motion without notice for an interim period not exceeding ten days.

[33] The Supreme Court's test for a prohibitive interlocutory injunction in the *RJR-MacDonald* case is set out at paragraphs 40 and 48. Before exercising its discretion, a court must consider the following questions:

- a. Is there a serious question to be tried? In other words, has the moving party presented a case which is not frivolous or vexatious?
- b. Will the moving party, if unsuccessful, suffer irreparable harm which cannot be compensated other than through the granting of an injunction?
- c. Does the balance of convenience favour the moving party? In other words, who will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits?

a. Serious issue to be tried

[34] The party requesting an injunction has the onus of demonstrating there is a serious issue to be tried. The determination of whether the threshold of a "serious issue to be tried" is met is based on common sense and an extremely limited view of the case on the merits (*RJR*, at paras. 78, 83). So long as the claim is not frivolous or vexatious, this factor of the test will generally be satisfied (*RJR*, at paras. 44-56, 78).

b. Irreparable harm

[35] The second element of the *RJR-MacDonald* test is whether the moving parties will suffer irreparable harm if the injunction is not granted. What must be established in this part of the test is whether refusing to grant an injunction will cause harm that cannot be remedied at some later stage. "Irreparable harm" refers to the nature of the harm suffered, rather than its magnitude. "It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*RJR*, at para. 59).

c. Balance of convenience

[36] The third factor, the balance of convenience, considers which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits.

Modified Test for a Statutory Interlocutory Injunction to Enforce Municipal By-Laws

[37] Section 440 of the *Municipal Act, 2001*, S.O. 2001, c. 25. 2006, c. 32 allows a municipality to bring an Application to restrain a person (or persons) from contravening its by-laws. It sets out the following:

Power to restrain

440 If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

[38] As in the motion before me, if an injunction is authorized by statute, different considerations apply from an injunction being sought at common law. The case of *Retirement Homes Regulatory Authority v. In Touch Retirement Living for Vegetarians/Vegans Inc.*, 2019 ONSC 3401 sets out how at para 47:

[39] Where a statutory injunction is sought:

- a) The Court's discretion is more fettered, and the factors considered by a court when considering equitable relief will have more limited application.
- b) An applicant will not have to prove that damages are inadequate or that irreparable harm will result if the injunction is refused.
- c) Proof of damages or proof of harm to the public is not an element of the legal test.
- d) There is no need for other enforcement remedies to have been pursued.
- e) The Court retains a discretion as to whether to grant injunctive relief. Hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed. However, an injunction will not issue where it would be of questionable utility or inequitable; and
- f) It remains more difficult to obtain a mandatory injunction.

[40] Where it is alleged that a municipal by-law is being breached, the emphasis for injunctive purposes is on whether there is a serious question to be tried. If the municipality satisfies the first criterion, the usual remedy is for the court to grant an interlocutory injunction that restrains the ongoing breach (*Hamilton (City) v. Loucks*, ONSC, 2003 CanLII 64221, at para. 30).

[41] In this modified test, there is no need for the City to prove that it will suffer irreparable harm and there is no need to consider the balance of convenience because the public authority is presumed to be acting in the best interests of the public and a breach of the law is considered to be irreparable harm to the public interest (*The Township of Amaranth v. Ramdas*, 2020 ONSC 2428, at para. 54). However, in this modified test, the first criteria (serious issue to be tried) should be higher than the standard required when all three criteria are considered under the *RJR-MacDonald* test. A strong *prima facie* case must be established (*Hamilton (City)* at para. 37).

[42] Where by-laws of a municipality are being violated, a court ought to assist the municipality by granting interlocutory relief (*Municipality of Metropolitan of Toronto v. N.B. Theatrical Agencies, Inc.*, 1984 CanLII 2092 (ONSC), cited in *Hamilton (City) v. Loucks*, ONSC, 2003 CanLII 64221, at para 30).

C. Charter Issues

[43] Counsel for the Minister of Justice for Ontario made the following submissions considering the *ex-parte* nature of this motion.

[44] He pointed out that, as part of its role in considering the Respondents' rights in the matter, at common law and under the *Ministry of the Attorney General Act*, RSO 1990 c M.17, the Attorney General is the Chief Law Officer of the Crown and the guardian of the public interest of all Ontarians. It has the responsibility to superintend all matters connected with the administration of justice in Ontario.

[45] The underlying proceeding in this case raises such issues of public importance, including the impact of the Demonstration on public health and safety, the freedom of movement of Ontarians, and the rule of law.

[46] The Attorney General has special expertise in the *Canadian Charter of Rights and Freedoms*, which issues may have been raised by the Respondents had they been present. The Attorney General intervened in the recent matter of *Automotive Parts Manufacturers' Association v. Jim Boak*, CV-22-00030791, which resulted in an injunction prohibiting impeding access to the Ambassador Bridge in Windsor.

[47] The Attorney argues that there is irreparable harm done to the Province when there is open defiance of the City's by-laws.

[48] The Attorney argues that there is no need to consider the *Charter* in relation to a statutory injunction. The breaches are not protected by the *Charter*.

[49] And, the Attorney argues, that the right to expression under section 2(b) of the *Charter of Rights and Freedoms* is not greater than a citizen's rights pursuant to the City's by-laws. There is no doubt that freedom of expression, as guaranteed by s. 2(b) of the *Charter*, and the related rights of freedom of conscience, peaceful assembly and association are some of the most important rights of a free and democratic society. However, freedom of expression, like all other *Charter* rights, is not an absolute right nor an unqualified one. The *Charter* does not give any person the legal right to unlawfully trample on the legal rights of others. Every *Charter* right must be balanced against other important values and rights.

[50] He has cited the following cases and legislation, which I have considered here (*Ontario v Old Colony Mennonite Church*, 2021 ONSC 4638 at paras. 1 and 66; *Oglaza v JAKK Tuesdays Sports Pub Inc*, 2021 ONSC 7473 at para. 29; *Ontario (Attorney General) v Paul Magder Furs Ltd*, 1991 CanLII 7053 (ON CA) at page 7; *Ontario (Attorney General) v Paul Magder Furs Ltd*, 1992 CanLII 7704 (ON CA) at page 12; *Her Majesty the Queen in Right of Ontario v Adamson Barbecue Limited*, 2020 ONSC 7679 at paras 18-20; *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para. 60, 67-68, 90, 94 and 99; *MacMillan Bloedel Ltd v Simpson*, 1994 CanLII 1731 (BC CA) at para. 38; *R v Banks*, 2007 ONCA 19 at paras. 115, 122, 129 and 131-132; *Batty v City of Toronto*, 2011 ONSC 6862 at paras. 3, 68-69, 85 85, 91-93, 96, 105, 108, 111 and 123; *Highway Traffic Act*, RSO 1990, c. H.8 a. Section 1 11 O. Reg. 69/22: *Declaration of Emergency* 12 O. Reg. 70/22: *Confirmation of Declaration of Emergency* 13 O. Reg. 71/22).

DECISION

[51] The evidence for the City in this matter is overwhelming. It not only satisfies the test for a common law injunction against the demonstrators pursuant to Section 101 of the *Courts of Justice*

Act and Rule 40.01 of the *Rules of Civil Procedure*, but it also satisfies the test for an injunction pursuant to Section 440 of the *Municipal Act*.

Common Law Injunction

[52] With respect to a common law injunction, the City has satisfied me that there is a serious issue to be tried here. There is a strong prima facie case that its by-laws are being breached and that the ongoing actions of the Respondents is an attack upon the rights of the public to live their lives unaffected by interference.

[53] I find that the City of Ottawa will suffer irreparable harm if the injunction is not granted. The Respondents are impacting the City's ability to perform essential functions and protect public safety. This is inhibiting them from fulfilling their obligations as a municipality.

[54] Justice Arrell's comments in *City of Brantford v. Montour et al.*, ONSC 6253, at para 35, apply in this case. When asked to assess the irreparable harm to a municipality in an injunction to respond to ongoing blockades, he stated:

In my view, the City will suffer irreparable harm, if that has not already occurred, if this situation is allowed to continue. I find as a fact, on the evidence before me, that the economy of this small city is at risk; the employment of members of the community are likewise at risk; the reputation of the City as a place to live, work and invest is at risk; the tax base is at risk; all as a result of the City being unable to regulate development, provide a conflict-free environment for investment, employment and the raising of families, and the inability of the City to ensure to local residents and the investment community that the rule of law prevails.

[55] In order to assess the balance of convenience, the Court must determine which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits (*RJR, supra* at para 48).

[56] In assessing the balance of convenience, the court must consider the relative impact on the parties in granting or withholding the injunction. The other factors of the test will influence the weight to be given to the balance of convenience (Robert J Sharpe, *Injunctions and Specific Performance* (2019) Thomson Reuters Canada at 2.530-2.540).

[57] The City is not seeking a complete ban on the respondent's demonstration. The right to expression and peaceful assembly is an important right protected by the *Charter of Rights and Freedoms*. However, there is ample evidence that the respondent's current actions and flagrant disregard for the City's by-laws go far beyond exercising their right to protest. The Respondents' actions are significantly impacting the City's ability to perform essential functions.

[58] In considering the balance of convenience, the City refers the Court to the discussion in *Canadian National Railway Company v. Doe*, at paras 9 and 10, citing *Canadian National Railway v. John Doe*, 2013 ONSC 115, and *Canadian National Railway Company v. Doe*, unreported, which sets out the following:

[...] expressive conduct by lawful means enjoys strong protection in our system of governance and law, expressive conduct by unlawful means does not. No one can seriously suggest that a person can block freight and passenger traffic on one of the main arteries of our economy and then cloak himself with protection by asserting freedom of expression.

Freedom of expression and association do not provide a legal basis to illegally deprive others of the enjoyment of their legal rights to use their land, operate their businesses, or travel. Neither does it guarantee the right to amplify one's voice by trammeling others' rights. The rule of law must be the dominant policy. If people do not respect the law, then our rights become meaningless.

[59] The Freedom Convoy 22' participants' rights to freely express themselves do not allow that their activities can deny fundamental rights and freedoms to all those detrimentally affected by the Demonstration.

[60] On a balance of convenience, the City will suffer the greater harm from a refusal of the granting of an interlocutory injunction

The Statutory Injunction Pursuant to S. 440 of the *Municipal Act*

[61] Even though the City has satisfied its onus for a common law injunction, instead, I granted the injunction pursuant to section 440 of the *Municipal Act*. The nature of this case specifically calls for a statutory injunction.

[62] First, the matter was urgent when it was brought before me on February 14, 2022. The Demonstration had been going on for weeks without any relief to the City or its citizens.

[63] Second, the City is seeking an injunction to enforce several of its by-laws which it has established are being breached. There are no exceptional circumstances which would justify a refusal to grant the injunction here (*Newcastle Recycling Ltd.v. Clarington (Municipality)*, [2005] O.J. No. 5344 (C.A.) at para. 32).

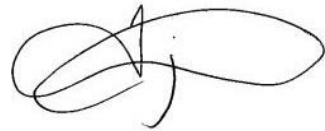
[64] Third, the City has provided full and frank disclosure. The strong evidence of ongoing breaches of multiple municipal by-laws has satisfied me that there is a serious question to be tried. The only remedy for this court is to grant an interlocutory injunction that restrains the ongoing breaches (*Hamilton_(City)* at para 30).

[65] Fourth, there is no need to consider the balance of convenience for a statutory injunction to issue. The City of Ottawa is presumed to be acting in the best interests of the public and a breach of the law is considered to be irreparable harm to that public interest.

[66] Fifth, there is no need for other enforcement remedies to have been pursued as part of the City's efforts to obtain an injunction pursuant to section 440 of the *Municipal Act*. However, clearly, there have been enforcement measures attempted by By-Law Officers and the Provincial Court. Those attempts have failed due to the actions of the demonstrators.

[67] Sixth, any hardship from the imposition and enforcement of an injunction will not outweigh the public interest in having the City by-laws obeyed. And these breaches arising from the Demonstration are not protected by the *Charter*.

[68] As a result, an injunction pursuant to the *Municipal Act* is the appropriate remedy.

A handwritten signature in black ink, consisting of a large, stylized 'F' and 'M' intertwined.

Associate Chief Justice Faye E. McWatt

Date: February 22, 2022